In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE

No. 703

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 248–260) is reported in 211 F. 2d 51.

JURISDICTION

The judgment of the Court of Appeals (R. 261) was entered on January 21, 1954. The petitions for writs of certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 5 U. S. C. 1952 ed. § 1040 and 28 U. S. C. 1952 ed. § 1254 (1).

QUESTIONS PRESENTED

An agreement by the Japan-Atlantic and Gulf Freight Conference was submitted to the Federal Maritime Board on December 24, 1952, and the terms of the agreement provide for a dual rate or penalty system whereby the Conference lines charge 9½% higher rates to a shipper who does not contract to give all of his business to the Conference lines. On January 21, 1953, the Board, without prior hearing and over the objections of a non-Conference line and the United States, issued an order which permits the Conference lines to use the dual rate or penalty system pending the outcome of an administrative proceeding. The Board reserved for consideration at a future hearing the protests filed by the United States and the non-Conference line, but the use of the dual rate or penalty system during the present period is not within the compass of the hearing, and the post-hearing decision will be prospective—and not retroactive—in application. The Court of Appeals set aside the Board's order insofar as it permitted the system to go

into operation without the prior approval required by § 15 of the Shipping Act, and the Court enjoined the Conference carriers from employing the system in the absence of such approval. The following questions are presented:

1. Whether an agreement by a Conference of water carriers to adopt a dual rate system is an agreement within the meaning of § 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in the Shipping Act.

2. If so, whether the Court of Appeals is authorized to grant injunctive relief preventing the effectuation of the agreement pending an administrative hearing and determination of the objections of the protesting parties.[1]

STATUTES INVOLVED

The relevant provisions of the Shipping Act (39 Stat. 728, as amended, 41 Stat. 996, 49 Stat. 1518, 46 U. S. C. 1952 ed. § 801 *et seq.*) and the relevant provisions of the so-called Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*) are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

The order of the Federal Maritime Board authorizes and permits the institution, effective

[1] The question as to whether the dual rate or penalty system is prohibited by § 14 of the Shipping Act and hence not susceptible of approval by the Board under § 15 of the Shipping Act was not resolved by the Court of Appeals.

January 23, 1953, of an exclusive patronage contract or dual rate system by the petitioners, the Japan-Atlantic and Gulf Freight Conference. Under the dual rate system, a shipper agreeing to forward by Conference vessels "all shipments made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf Ports and Atlantic Coast Ports of North America, whether such shipments are made C. I. F., C. & F., F. O. B., ex godown or by any other terms" receives the benefit of the contract rate, which is 9½ percent less than the non-contract rate (R. 60–63, 6). Any shipper who refuses to boycott non-Conference carriers is required, when shipping on Conference lines, to pay 9½ percent higher than the exclusive patronage contract rate for identical services. Any shipper who violates the exclusive patronage contract by making a single shipment with any non-Conference carrier is required to pay as liquidated damages to the Conference "fifty per-centum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the [Conference] Carriers at the Contract rate currently in effect" (R. 61). If any shipper violates the exclusive patronage contract more than once during any period of twelve months, his contract with the Conference will be cancelled and he will not be

permitted to enter into a new agreement until the liquidated damages have been paid in full (R. 61).

The Conference filed with the Board, on December 24, 1952, a statement proposing the adoption of the exclusive patronage contract or dual rate system, and the United States and a non-Conference line, i. e., Isbrandtsen Company, Inc., promptly filed protests with the Board urging that the proposal was unreasonable, retaliatory, unjustly discriminatory, and illegal under the Shipping Act, and should be disapproved, and requesting that its effective date be suspended pending the conduct of a full hearing (R. 64–104, 139–143). But the Board, without having conducted a hearing, entered the order under review on January 21, 1953 (R. 221), denying the protestants' requests and permitting the Conference lines to use the dual rate or penalty system pending the outcome of an administrative hearing, and such hearing is not with respect to the use of the dual rate system during the present time inasmuch as the post-hearing decision will be prospective—and not retroactive—in application.

Isbrandtsen thereupon instituted review proceedings in the Court of Appeals. The United States was named as respondent, and the Secretary of Agriculture intervened pursuant to an order of the Court of Appeals. The Court of Appeals issued its opinion on January 21, 1954,

holding that the Conference agreement to adopt the dual rate system was an agreement which must be submitted to the Board under § 15 of the Shipping Act, and that such agreement is illegal unless and until approved by the Board, and that the Board's action in permitting the dual rate system to become effective in advance of a hearing and determination under § 15 of the Shipping Act was unauthorized, and that such action by the Board was immediately reviewable (R. 248). The Court's judgment (R. 261) restrains the effectuation of the Conference proposal pending a determination by the Board relative to its legality in conformity with § 15 of the Shipping Act.

INTEREST OF THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture intervened in this case (1) to represent the interests of the agricultural community in obtaining equitable transportation rates and services for shipments of agricultural products,[2] and (2) to represent the Department of Agriculture's direct interest as a large shipper of agricultural commodities.

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[2] Under § 203 (j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1952 ed. § 1622 (j)), the Secretary is authorized and directed to assist in obtaining equitable and reasonable transportation rates and services for agricultural products by, *inter alia*, making complaint to the Federal Maritime Board and to other Federal and State transportation regulatory bodies.

The issue as to the validity of the dual rate system is of basic and widespread importance with respect to the transportation of agricultural products. For example, approximately 27 million tons of agricultural products were exported by ocean carriers in 1951.[3] It is important to the agricultural industries and to the Department of Agriculture that shipping rates be competitive and reasonable so as to encourage and favor the exportation of American agricultural products. If the Conference lines can coerce shippers into discontinuing to patronize the non-Conference lines, and thereby eliminate non-Conference competition, then the economic freedom of bargaining of shippers becomes a nullity—having no place else to go, the shippers must accept Conference rates.

With a complete monopoly of the trade, the Conference lines would have the economic power to charge much higher rates than would be possible with the check of independent competition. The recourse of appealing excessively high rates to the Maritime Board, which may disapprove the Conference agreements, is not an adequate remedy for shippers. Such recourse would probably involve protracted hearings as to the excessiveness of the rates and require the hiring

[3] Computed from Commercial Statistics, Water-Borne Commerce of the United States for the Calendar Year 1951, Department of the Army, Annual Report of the Chief of Engineers, 1952, Part 2, Table 2, pp. xx–xxv.

of counsel to present the shipper's case.[4] It could not be as effective in curbing excessive rates as independent competition.

The position of the Secretary is that shippers of agricultural products should be free to bargain with both the Conference and non-Conference lines and thereby obtain the cheapest rates available—and obtain them without being penalized for patronizing the non-Conference lines. Congress, in enacting the Shipping Act, 1916, did not intend to sanction the destruction of free competition in ocean shipping, but sought rather to guarantee to shippers both the economic freedom of bargaining and the right of equal treatment.

ARGUMENT

The statement which the Conference filed with the Board in December 1952 was a memorandum of an agreement by the members of the Conference to adopt, on a certain date, the exclusive patronage or dual rate system. The term "agreement" in § 15 of the Shipping Act "includes un-

[4] The Alexander Committee recognized, on page 306 of its Report (H. R. Doc. No. 805, 63rd Cong., 2d Sess., 1914), that:

"Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers cannot afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances. * * * Shippers, on the contrary, live far apart and because of their different and frequently antagonistic interests can only combine for mutual protection with the greatest difficulty."

derstandings, conferences, and other arrangements," and every common carrier by water subject to the Act is required to file with the Board "a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement" (46 U. S. C. 1952 ed. § 814). The dual rate system is manifestly "an agreement" within the definement of that term in § 15 of the Shipping Act, and a dual rate proposal must be specifically and independently considered, in accordance with proper administrative proceedings, before it can have any claim to legality. *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen,* 336 U. S. 941.

The brief for the United States, in opposition to the petitions for certiorari, gives reasons which, we believe, warrant the conclusion that the petitions should be denied, and we adopt, on behalf of the Secretary of Agriculture, the argument in the brief for the United States.

CONCLUSION

It is respectfully submitted that the petitions for the writs of certiorari should be denied.

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MAY 1954.

APPENDIX

The following are the relevant provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 49 Stat. 1518, 46 U. S. C. 1952 ed. § 801 *et seq.*:

> SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
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> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.
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> Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing

competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense (46 U. S. C. 1952 ed. § 812).

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the * * * Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or

traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the * * * [Board] shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be ex-

cepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action (46 U. S. C. 1952 ed. § 814).

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (46 U. S. C. 1952 ed. § 815).

* * * * *

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

> Whenever the * * * Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge (46 U. S. C. 1952 ed. § 816).

The following is the relevant provision of the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*:

> SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended (5 U. S. C. 1952 ed. § 1032).

U. S. GOVERNMENT PRINTING OFFICE: 1954